THE IMPACT OF REGULATIONS ON MULTI-NATIONAL ACQUISITION

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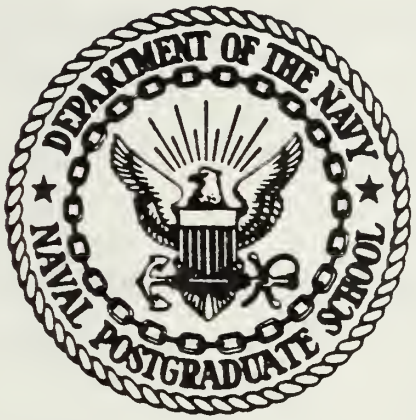

THESIS

THE IMPACT OF REGULATIONS ON
MULTI-NATIONAL ACQUISITION

by

Christopher P. Sager

December 1979

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There are a variety of United States Statutes that impact the contracting officer during the acquisition of requirements from foreign sources. Some of these statutes have provisions for making a determination for thier waiver, for others no waiver is possible without Congressional action. The U. S. has entered the world weapons market on an increasing scale in the past few years as a result based, in part, on the new emphasis on NATO cooperation.

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International considerations are important aspects to be evaluated during the acquisition cycle. Existing international programs have experienced a reluctance by foreign countries and firms to utilize U. S. imposed contracting procedures by the country or firm in their domestic environment, procedures that frequently differ from what is considered normal or standard for the particular country or firm in their domestic environment, procedures that frequently differ from what is considered normal or standard for the particular country or firm. This thesis addresses the U. S. regulations that have proven to be difficult to impose on foreign governments and contractors and analyzed the alternatives available to the contracting officer; waivers and alternative procedures that provide the same level of confidence as the original statute. The thesis concludes by offering some recommendations to improve the international contracting process.

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by

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Lieutenant Commander, United States Navy
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ABSTRACT

There are a variety of United States Statutes that impact the contracting officer during the acquisition of requirements from foreign sources. Some of these statutes have provisions for making a determination for their waiver, for others no waiver is possible without Congressional action. The U. S. has entered the world weapons market on an increasing scale in the past few years as a result based, in part, on the new emphasis on NATO cooperation. International considerations are important aspects to be evaluated during the acquisition cycle. Existing international programs have experienced a reluctance by foreign countries and firms to utilize U. S. imposed contracting procedures by the country or firm in their domestic environment, procedures that frequently differ from what is considered normal or standard for the particular country or firm. This thesis addresses the U. S. regulations that have proved to be difficult to impose on foreign governments and contractors and analyzed the alternatives available to the contracting officer; waivers and alternative procedures that provide the same level of confidence as the original statute. The thesis concludes by offering some recommendations to improve the international contracting process.

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I. INTRODUCTION

A. GENERAL

It has been stated that each government has the obligation and right to insure the physical safety of its citizens, and each government has the duty to preserve the nation's ability to pursue legitimate interests in the international environment. United States foreign policy seeks as a minimum the goals of security and freedom for its citizens and for its allies.

A direct link exists between this nation's foreign policy and its military forces. The military exists to undergird our foreign policy, to assist it in peacefully attaining our national security objectives.

A new facet of United States foreign policy was brought forth by President Carter in May, 1977, during remarks made at the North Atlantic Treaty Organization's (NATO) ministerial meeting. The common goals of the European and North American members of the Alliance were recognized and reinforced.

The President stated in part [1:6]:

> The collective deterrent strength of our Alliance is effective. But it will only remain so if we work to improve it. The United States is prepared to make a major effort to this end,...in the expectation that our Allies will do the same.
>
> There have been real increases in allied defense spending. But difficult economic conditions set practical limits. We need to use limited resources wisely, particularly in strengthening conventional forces. To this end: We must combine, coordinate and concert our national programs more effectively... .

This statement brought into sharp focus the policy of attempting to realize more effective and economical military

alliance by improving cooperation in development, production and procurement of Alliance defense equipment. In support of this policy, both the Congress and the Department of Defense (DOD) have passed legislation and have made policy statements to implement the goals of cooperative weapons development in the acquisition process.

In this relatively new policy environment, a solidification process is taking place. There is not full agreement on the benefits to be gained from this policy, or how the new policy will meld in and dovetail with previously existing policies. Different interpretations exist on how the cooperative weapons development policies will be implemented. DOD and its service departments are on the cutting edge of implementing the policy while many different hands are on the knife trying to determine and direct the proper surgical technique.

B. RESEARCH QUESTION

The U. S. currently has many policies and programs that are implemented through the acquisition process. Not all of these programs have the same goals, and at times some program goals tend to conflict. The area of cooperative weapons development is an example where conflict has developed between the new policy and previously existing ones. These policies all have some basis in law, some enacting legislation that gave birth to a program, and frequently subsequent legislation further refining the policy.

It is this area of where legislation enacted for one purpose conflicts with the goals of another that provides the

basis for the research question of this study: What is the impact of the United States' acquisition regulations (which are based on laws and statutes) on cooperative weapons acquisition? Further, what are some of the difficulties attendant with performing the contracting process to meet current policy goals in our present legal and statutory system?

C. OBJECTIVE

The objective, therefore, is to identify the various laws, statutes, regulations and policies that define the current policy environment of cooperative weapons development and determine the impact on the acquisition process from the point of view of the Procuring Contracting Officer (PCO).

D. SCOPE

The thrust of the research is directed at defining the acquisition arena within which the PCO finds himself. It is intended to analyze the principal problems brought about by the emphasis on international considerations during the weapon system acquisition process and further to analyze how the problems are overcome to acquire the desired goods and services and meet the variety of goals required in the Federal Government's procurement process.

E. ASSUMPTIONS

It is assumed that the reader has a basic familiarity with the Defense Acquisitions Regulation, the Defense System Acquisition Review Counsel (DSARC) process and the Major Systems acquisition process as embodied in the Office of Management and Budget Circular A-109 and DOD Directives 5000.1 and 5000.2.

F. METHODOLOGY

This research was based on two primary methods: literature search and personal interviews. The literature search began with a review of articles published in DOD journals and reports and research sponsored by various DOD agencies. It also includes considerable testimony and subsequent reports before both Houses of Congress and their various sub-committees.

Although there are studies and reports which now identify the various statutes that impact the international acquisition process, a very limited amount of information is available relating how the requirements of the statutes are translated into a multi-national meeting of the minds and subsequent contract.

The logical source for this type of information is from personnel currently engaged in international programs. Interviews were conducted with various involved Government personnel, with Navy personnel being the primary source.

G. ORGANIZATION

This thesis consists of six chapters. Chapter II deals with legal statutes and regulations that comprise the framework of international contracting. Chapter III gives a historical perspective to provide a background of the current international acquisition arena. Chapter IV analyzes the issues and problems that are currently experienced with Chapter V reviewing how these problems have been dealt with on specific programs. Finally, Chapter VI integrates the problems and their solution with conclusions and recommendations.

II. FRAMEWORK

A. LEGAL BASIS

There is more than one basis for the procedures utilized in placing contracts for military goods and services. The primary basis is found in Acts of Congress codified under general topics in the United States Code. The laws relating to the armed forces are generally found in Title 10 of the Code, although numerous Acts that apply to the procurement procedure may be uncodified such as appropriation acts or legislation too recent to have been published in the Code.

The implementing procurement regulations are contained in a collection of formally published regulations known as the Defense Acquisition Regulation. These regulations are issued under statutory authority and have the force and effect of law.

With a new commitment toward a policy of cooperation in the development, production and procurement of defense equipment, DOD has found that differences in the contracting practices and procedures of the various governments have made inter-allied procurement difficult to achieve.

Two general areas of difference between American and foreign practices have made it difficult to accomplish multinational procurement goals.

The first general area is the statutory requirement in American law that Government contracts be awarded after the maximum degree of competition is obtained; although there are at least some nations where there is a policy of favoring

competition, the legal difference, nevertheless, appears to have significance. [2:4]

The other general subject area is in the use of "boiler plate" clauses, contract clauses required by law which embody some social or economic policy. One of the policies, for example, favors U. S. shipping firms over foreign firms; another provides for examination of thecontractor's records by the Comptroller General.

Since under the new policy, equipment is procured not only for American forces but also for foreign nations, the argument can be made that these statutory policies should be extended to foreign procurements as well.

B. FORMAL ADVERTISING

From a procedural standpoint, American statutes prescribe that the award of a contract will be accomplished, to the maximum practical extent, on a formally advertised competitive basis to the lowest responsive and responsible bidder. This predisposition has a very long history in American jurisprudence.

As one commentator described it in 1809 [3:7]:

> ...there was enacted the first of a long series of laws... imposing a general requirement for the use of formal advertising in the procurement of supplies and services. That statute provided that all purchases and contracts by the Secretaries of the Treasury, War and Navy would be made 'either by purchase or by previously advertising for proposals respecting the same.'

The following are some of the fundamental requirements of United States law relating to this procedural preference [4: 1581]:

TITLE	SUBSTANCE
Formal Advertising	Appropriated funds shall not

Annual DOD Appropriation Act; e.g., Fourth provision of sec. 823, P.L. 95-111	be used except that, so far as practicable, all contracts shall be awarded on a formally advertised competitive bid basis to the lowest responsible bidder.
Formal Advertising Awards 10 U.S.C., sec. 2305(c)	In advertised procurement, award shall be made to the responsible bidder where bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered.
Maximum Competition 10 U.S.C., sec. 2304(g), as amended	In all negotiated procurements in excess of $10,000 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals, including price, shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured. Except in stated circumstances, requires written or oral discussions be held with all offerors within competitive range.
Exceptions to Formal Advertising 10 U.S.C., sec. 2304(a)	Contracts for property and services shall be made by formal advertising to the extent feasible and practicable except that negotiation is allowed in 17 stated situations. Section 2304(a)(1) which authorizes the negotiation of contracts "when determined in the public interest during a national emergency declared by the Congress or the President" is used as authority to make partial set-asides for labor distressed areas. The national emergency declared by the President on December 16, 1950, is still in effect.

There are numerous exceptions to the general rule of formal advertising. The high cost associated with the high technology

of modern armaments means that in dollar terms the vast majority of military procurements are not formally advertised. Nevertheless, the concept remains a fundamental principle of Government contract law.

In other countries, the legal situation is vastly different. This researcher will not provide a detailed analysis of the differences, but reference to general descriptions of some of the various systems will be noted.

One recent article emphasizes in dramatic terms the absence in the British system not only of legal requirements for formal advertising, but also of those statutory mandates or guidelines relating to such areas as small business and domestic industry which are a characteristic of the American system [5:86]:

> One of the most striking things in British government contracting practice is the absence of elaborate statutes governing the procurement process. ... The British government has no general procurement act, such as the Armed Services Procurement Act or Title III, Federal Property and Administrative Services Act. There is no statute requiring that public contracts be made by competitive advertising. As a matter of policy, the British government engages in as much competitive advertising as it can because it believes that this is the soundest way to get the most reasonable price. ... A further striking difference to the American observer is the relative absence of statutes which declare public policies applicable to government contracts. For example, in the United States we have the Buy-American Act, Walsh-Healey Public Contracts Act, and others, which express social, labor, or economic policies affecting government contracts. The British government has practically none of this, although contracts are subject to a 'fair wages' resolution made by Parliament in 1946.

As the foregoing indicates, British public contracts are generally awarded after the Government obtains as much competition as it deems feasible, but obtaining such competition is not a legal requirement in the American sense of the term. Therefore, although procurement in the United Kingdom is not subject to a

statutory requirement of formal advertising, there is a considerable effort to obtain competition in that system.

This is substantially less true in other countries. A recent study of the Italian economy, for example, discussed at some length the increasing importance of the "state holding groups," which are in effect corporations of mixed public and private ownership. They are very deeply involved in such important industries as steel, heavy engineering and shipbuilding [6:217].

The oldest and most comprehensive of the restrictive statutes that specifically favors American products is the Buy-American Act, 41 U.S.C. 10a-10d [2:9]:

> Notwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use. This section shall not apply with respect to articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonable available commercial quantities and of a satisfactory quality.

C. "BOILER PLATE"

Reference has been made to the use of so-called "boiler plate" clauses--clauses which are required by law to be inserted in procurement contracts in order to carry out some social or economic policy.

While some of the policies reflected in DOD contracts could probably be universally approved, various countries have evidenced a reluctance to include some basic contract provisions that are mandatory in United States contracts.

The following are some of the "boiler plate" requirements considered unique to the United States law which are most frequently found repugnant to other countries[4:1582]:

TITLE	SUBSTANCE
Gratuities 10 U.S.C., sec. 2207	Requires contract clause providing for termination of contract and other penalties in the event gratuities were offered or given to any officer or employee of the Government with a view toward securing favors in regard to Government contracts.
Covenant Against Contingent Fees 10 U.S.C., sec. 2306(b)	Contractor must warrant in contract that no person or selling agency has been employed or retained to solicit or obtain such contract for a commission or contingent fee, excepting bona fide employees or selling agencies of contractor.
Officials Not to Benefit 41 U.S.C., sec. 22 and 18 U.S.C., sec. 431	Requires clause in every agreement or contract entered into by or on behalf of the United States that no member of Congress may share in or receive any benefits from the Government contract.
Examination of Records 10 U.S.C., sec. 2313(b)	Every contract negotiated under this Act shall provide for examination by GAO of records of the contractor and his subcontractors for 3 years following final payment under the contract. Statute provides for exception to be made for a foreign contractor or subcontractor based on a determination made in accordance with this section.
Cost Accounting Standards Section 710 of the Defense Production Act of 1950, as amended, 50 U.S.C. App. 2168	Certain negotiated defense contracts and subcontracts in excess of $100,000 are required to contain a clause providing for disclosure and adherence to disclosed costs accounting practices and compliance with Cost Accounting Standards established

	by the Cost Accounting Standards Board. These standards cover not only matters such as consistence in estimating, accumulating and reporting, costs consistency in allocating costs incurred for the same purpose, but also matters such as capitalization of tangible assets, accounting for costs of compensated personal absence, and allocation of business unit general and administrative expenses.
Submission of Cost and Pricing Data 10 U.S.C., sec. 2306(f)	Prime and subcontractors shall be required to submit accurate, complete and current cost or pricing data and certify thereto in all non-competitive contracts over $100,000 unless prices are set by law or regulation, are catalog prices of commercial items with substantial public sales, or requirement is waived by head of agency. For purpose of assuring compliance with provisions of section 2306(f) requiring submission of accurate, complete and current cost data and certification thereof, agency may examine books of contractor or subcontractor relating to negotiation, pricing or performance of the contract or subcontract until three years after final payment.
Advance Payments 10 U.S.C., sec. 2307	Advance payments may be made only upon adequate security and if the agency determines in writing that such payments are in the public interest. Advance payments over $25 million not provided for in original terms of a contract must be notified to the Congress.
Vinson-Trammel Act 10 U.S.C., sec. 2383; 10 U.S.C., sec. 7300	With certain exceptions any contract or subcontract thereunder over $10,000 for construction of aircraft or naval vessels, or any portion thereof, shall contain clause making applicable the provisions of the Vinson-Trammel Act regarding excess profits. The

	Vinson-Trammel Act is currently in effect by virtue of the expiration of the Renegotiation Act of 1951.

D. APPROPRIATION RESTRICTIONS

Other provisions of U. S. law contained in the annual DOD Appropriation Authorization and Appropriation Acts restrict the availability of funds for acquisition of foreign source supplies and services. In addition, they prescribe unique limitations on reimbursement of costs under certain contracts. [4:1584]

TITLE	SUBSTANCE
Restricted Commodities Annual DOD Appropriation Acts, e.g., 823 of DAR 6-302	Restrictions on availability of appropriations for procurement of articles of food, clothing, cotton, woven silk and woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric, specialty metals, or wool not grown, reprocessed, reused or produced in the United States. Exception made in the case of specialty metals where procurement is in furtherance of standardization and interoperability of equipment within NATO.
Research and Development Limitations Section 744 of P.L. 92-570 DAR 60307	No R&D contract in connection with a weapon system may be made with a foreign source where there exists a United States source equally competent and willing to perform at a lower cost.
Social and Economic Limitations Section 707 of P.L. 93-365 (also sec. 604 of the Foreign Assistance Act of 1961, 22 U.S.C., 2354 and sec. 42 of the Foreign Military Sales Act, 22 U.S.C., 2791	No funds appropriated to the DOD may be used to buy other than United States manufactured items unless adequate consideration has been given to the United States firms, labor surplus areas, United States small business, the United States balance of payments, and certain costs associated with buying foreign; unless otherwise permitted under the Buy-American Act.

Naval Construction Limitations Annual DOD Appropriation Acts under Shipbuilding and Conversion, Navy	Appropriated funds may not be used for the construction of major components of a Navy vessel in a foreign shipyard. Appropriated funds shall not be used for the construction of any Navy vessel in a foreign shipyard.
IR and D Costs and Bid and Proposal Costs Section 203 of P.L. 94-441; 10 U.S.C., 2358 ft. nt.	Limits the availability of funds authorized for appropriation to the DOD under that Act or provisions of any other Act for payment of independent research and development of bid and proposal costs under contracts subject to the submission and certification of cost or pricing data under 10 U.S.C., 2306(f) unless the work has a potential relationship to a military function or operation and, in stated circumstances, an advance agreement on these costs is obtained from contractor.
Advertising DOD Authorization Acts; e.g., sec. 823 of P.L. 93-437	No funds appropriated by this Act shall be available for paying the costs of advertising other than out of profits by any defense contractor, except for recruitment, procurement of scarce items, or disposal of scrap or surplus materials.

Inclusion of these requirements in foreign contracts has often been difficult; largely, one might assume, because the insertion of "boiler plate" clauses is not a familiar process in most countries [2:5].

Whatever the reasons, foreign contractors have been reluctant or unwilling to include such clauses in their contracts.

Some of these requirements, like the restrictions on appropriations, explicitly limit DOD's authority to make procurements abroad. Others, like the requirement for observing Cost Accounting Standards, merely impose onerous bookkeeping procedures.

Still others, like the prohibition against gratuities, may be regarded as virtually unenforceable in certain foreign contexts.

Research has indicated that foreign contractors, in addition to raising specific problems with specific clauses, have a more generalized objection to the inclusion of the "boiler plate" provisions that occupy a major portion of the DAR.

III. BACKGROUND

A. POLICY DEVELOPMENT

The Department of Defense has experienced a new era in acquisition policy to meet growing international defense programs. These programs had their genesis in the period following World War II with U. S. Grant Aid and Foreign Military Aid. The most recent program efforts center around NATO Rationalization, Standardization and Interoperability (RSI), a more cooperative effort with foreign nations sharing in weapons contracts.

In the 1970's the monopolistic control by the U. S. arm's industry in the military hardware market began to diminish. Foreign countries began to develop their own capabilities to produce military hardware. Our Allies, especially the NATO countries, began demanding a share of the weapons development market.

With the high costs associated with developing and producing a new weapon system, there is a potential for more effective utilization of resources through cooperative international acquisition programs. Congress reflected its view in the "Culver-Nunn" Amendment to the DOD Appropriation Act of 1977 by a statement on cooperative weapon acquisition with out NATO Allies.

The Amendment states in part [7:10]:

> It is the policy of the United States that equipment procured for the use of personnel of the Armed Forces of the United States in Europe..... should be standardized or at least interoperable with equipment of other members of the North Atlantic Treaty Organization.

To implement this policy, the amendment went on to require that [7:10]:

> The Secretary of Defense shall to the maximum feasible extent initiate and carry out procurement procedures that provide for the acquisition of equipment which is standardized and interoperable.

This legislation also authorized the Secretary of Defense to waive the "Buy-American" Act where he deemed it in the best interest of the national defense in order to procure standardized or interoperable equipment.

President Carter emphasized the cooperative policy in his previously mentioned remarks to the NATO ministerial meeting in May of 1977. He further defined the need when he stated [1:6]:

> As we strengthen our forces, we should also improve cooperation in development, production and procurement of alliance defense equipment. The alliance should not be weakened militarily by waste and overlapping. Nor should it be weakened politically by disputes over where to buy defense equipment....We must make a major effort...to eliminate waste and duplication between national programs; to provide each of our countries an opportunity to develop, produce and sell competitive defense equipment; and to maintain technological excellence in allied combat forces.

The Department of Defense reinforced the President's message by promulgating policy guidance in 1977 to include NATO Rationalization, Standardization and Interoperability (RSI) goals in new acquisitions.

The policy states, in part, that [8:1-2]:

> (1) It is the policy of the United States that equipment procured for U. S. forces stationed in Europe under the terms of the North Atlantic Treaty should be standardized or at least interoperable with equipment of other members of the North Atlantic Treaty Organization.
>
> (2) The Department of Defense will actively seek standardization and interoperability of weapon systems and equipment within NATO on a priority basis in order to conserve resources and increase the combined combat capability of the U. S. and NATO forces.

(3) The DOD components will include NATO standardization and interoperability goals as fundamental considerations in their development and procurement programs for both major and minor equipment items.

The directive offers some clarification of the terms "rationalization," "Standardization" and "interoperability." It provides the following [8:11]:

> Rationalization. Any action that increases the effectiveness of Alliance forces through more efficient or effective use of defense resources committed to the Alliance. Rationalization includes consolidation, reassignment of national priorities to higher Alliance needs, standardization, mutual support, improved interoperability or greater cooperation. Rationalization applies to both weapons/material resources and non-weapons military matters.
>
> Standardization. The process by which member nations achieve the closest practicable cooperation among forces; the most efficient use of research, development, and production resources; and agree to adopt on the broadest possible basis the use of: (1) common or compatible operational, administrative, and logistics procedures; (2) common or compatible technical procedures and criteria; (3) common, compatible, or interchangeable supplies, components, weapons, or equipment; and (4) common or compatible tactical doctrine with corresponding organizational compatibility.
>
> Interoperability. The ability of systems, units, or forces to provide services to and accept services from other systems, units, or forces and to use the services so exchanged to enable them to operate effectively together.

DOD has also incorporated RSI guidance in its cornerstone directives on major system acquisition. The current draft revision, 14 August 1979, to DOD Directive 5000.1 and 5000.2 provides [9:3]:

> NATO rationalization, standardization and interoperability (RSI) is a basic consideration of systems having a partial or total application to Europe.
>
> That action shall be taken in the following areas [10:17]:
>
> Consider NATO country participation throughout the acquisition process.
>
> Consider NATO doctrine and NATO member threat assessments...mission needs of NATO members should be considered.

Consider all existing and developmental NATO member systems that might address the mission need.

Develop plans for further international cooperation in subsequent phases of the acquisition cycle (cooperative development, co-production, subcontracting, etc.).

The essence of the policy efforts has been to insure that DOD maintains a better liaison with its allies on armaments, to consider allied solutions to U. S. military needs, and offer allied countries suitable participation in U. S. programs.

Key to the implementation of the current RSI policy is the use of the DSARC and the Decision Coordinating Paper. The Assistant Secretary of Defense for International Security Affairs and the Advisor to the Secretary of Defense on NATO Affairs are now members of the DSARC for programs having RSI implications and they review related Decision Coordinating Papers. For systems with a total or partial application to NATO, RSI is a fundamental part of the acquisition strategy.

The Department of Defense has been involved in extensive pronouncements in support of cooperative weapons programs. Secretary of Defense Brown in his annual report to the Congress regarding NATO RSI stated [11:3]:

> The Department of Defense will vigorously pursue greater compatibility of U.S. and Allied Forces to improve their ability to operate effectively together and, to the extent feasible, achieve more efficient Alliance resource utilization. We will continue to emphasize rationalization/standardization and interoperability including, as appropriate, increased purchases or license of Allied equipment.

Dr. William J. Perry, Under Secretary of Defense, Research and Engineering, in his statement to the Congress on the FY 1979 DOD Program for Research, Development and Acquisition summarized DOD policy as [12:5658]:

> We intend to promote, to the maximum extent practical, cooperative material programs with our Allies--particularly NATO countries--in order to further our mutual economic interests and common defense. Such cooperation can improve the overall effectiveness of our forces and simultaneously reduce cost through the employment of commonality, standardization and other efficiencies.

The focus of international acquisition programs in DOD has been the RSI effort with our NATO allies. To this end, DOD submitted two pieces of legislation in the 95th Congress proposing wide latitude for the Secretary of Defense (SECDEF) in granting waivers to statutory contract provisions for the purpose of facilitating international cooperation.

One was designed to facilitate agreements with NATO countries for host nation support. The other proposed to expand the SECDEF's authority to enter into agreements with foreign governments for the purchase of property or services.

Both proposals were heavily criticized by the Congress for the excessive legal authority they would grant the Secretary of Defense for the purchase of property and services. They would empower the Secretary, "notwithstanding any other provisions of law," [13:1162] to enter into standardization agreements or enter into agreements for the purchase of property or services and "waive the application of any provision of law prescribing procedures to be followed in the formation of contracts...." [13:1171].

Neither proposal survived the committee hearings because of the Congressional concern that they went too far and because of their unknown impact, although not easily quantifiable, as related to the U. S. economy, unemployment, trade balance and similar issues.

Notwithstanding such criticism, DOD remains firmly committed to its international cooperative programs with NATO RSI the primary thrust of current efforts.

B. DOD RATIONALIZATION, STANDARDIZATION AND INTEROPERABILITY PROGRAMS

The Office of the Secretary of Defense has developed a series of initiatives to carry out the mandated policy on NATO cooperative armaments. These efforts have centered around three areas: Mutual Defense Cooperation, Family of Weapons, and Dual Production.

Mutual Defense Cooperation applies to agreements established between two or more countries. These agreements, known as Memorandum of Understanding (MOU), have been developed to set forth guiding principles governing cooperation between a foreign country and the U.S. in research, development, production, procurement and logistic support of conventional defense equipment.

A specific MOU is usually developed to cover a unique program. The content of a MOU may vary widely. Some are umbrella-type agreements which give only general guidelines regarding program objectives. Others are detailed, giving specific criteria to be followed during program implementation.

The most salient feature of a MOU is the agreement between the signing parties to evaluate offers or proposals without applying price differentials under buy national laws and regulations [13:44].

Often associated with the MOU's are Offset Programs. Offset Programs involve agreements whereby a portion of the total

value of a primary sales agreement will be expended through secondary sales to industries in the foreign country. Other terms in connection with or often interchangeable with "offset" include "two-way street" used by the Europeans and "quid pro quo."

Because of the inherent difficulties in negotiating and implementing compensatory offset agreements, and the potential for economic inefficiencies, they often entail, DOD now enters into such agreements only when there is no feasible alternative to insure the successful completion of transactions considered to be of significant importance to U. S. national security. [14:589]

When such agreements are utilized, the following general guidelines apply [14:589]:

(1) Agreements are to be as broad as possible.

(2) Specific offset targets are to be avoided.

(3) Agreements are to be used as vehicles for reducing or waiving administrative barriers to defense trade erected by all parties.

(4) Foreign firms bidding on contracts under the terms of such agreements must do so actively and compete on an equal basis with U. S. firms.

(5) Agreements involving specific arrangements should specify that the burden for fulfilling any commitment rests with the U.S. firms directly benefiting from the sale.

The Family of Weapons concept is the most controversial of the initiatives and is presently still in the exploratory stage. It is an approach to arms cooperation which is designed to eliminate competition between member nations by a process of grouping "families" of weapons and then dividing up the work so that no two nations would develop weapons for the same mission area.

Conceptually, for example, one nation (or consortium of nations), would take the lead in developing a short-range ship-to-ship missile while others would concentrate on long-range ship-to-ship missiles.

No doubt this approach could reduce duplicative research and development costs. However, national security issues are being raised since a void would be experienced in organic technological studies for certain weapons systems; a country would not have control to insure development is timely to meet its particular needs and total development by others may not meet the complete needs of the non-involved countries.

Based on these concerns and the results of the Special Sub-Committee on NATO RSI and Readiness which found the concept "still formless and undefined" [7:27], additional review of the final form of this initiative is being conducted by the Office of the Secretary of Defense.

Dual Production in the form of cooperative development and cooperative production programs between the U.S. and NATO are the most visible operating initiatives today. Weapon systems such as the Roland missile, the F-16 aircraft, NATO Seasparrow and Sidewinder missiles are categorized as dual production efforts.

Such collaboration normally includes a sharing of technology and costs by the countries and companies involved. The following types of activities are included under cooperative development programs [15:8]:

a. Data exchange. Participating parties exchange technical and scientific information of mutual interest.

b. Allocated development. Participants define an R and D problem in terms of tasks, allocate responsibilities for task accomplishment, complete tasks using national resources and finally share the outcome.

c. Adaptive development. The U. S. obtains for evaluation and possible adoption existing material which has been or is being developed by other participants.

d. Interdependent development. This is akin to the "family of weapons" concept. Participants agree on a requirement but one participant goes it alone on the development process.

e. Joint development. A shared responsibility is established for funding and managerial or operational aspects of the program.

f. Competitive R&D. This involves the independent development of systems by two or more participants, with a competition conducted for the best system. The result is a standard system accepted by all the participants.

C. IMPACT ON THE ACQUISITION MANAGER

Every day the acquisition manager experiences a greater involvement in a multi-national environment as a result of these policies and the various programs designed to implement the policy. Requirements determination must consider not just U. S. but NATO systems and readiness needs as well as the potential to meet the requirements from systems already developed in a foreign country.

Both DOD and service acquisition review boards require such an assessment be incorporated into every step of the acquisition decision process. When the acquisition manager finds himself in the international arena, a variety of new challenges are faced.

These new challenges cover a broad spectrum and include technology transfer, control of third country sales, currency transactions and the problem of fluctuating currencies, foreign

industry/government relationships, contract format, monitoring acquisition progress, language delays, production problems and overall awareness of their countries' ways of doing business.

The emphasis of current policies and programs is closely related to NATO cooperation. In all international acquisitions, the contracting officer finds himself in a middle ground bearing the brunt of the responsibility of translating U. S. laws, statutes, policies and programs into a workable agreement with a foreign party.

The remainder of this thesis will be devoted to analyzing specific problems the U. S. Government contracting officer experiences within the existing legal and regulatory environment to place a contract with a foreign party. The analysis will center around the legal and regulatory impediments that must be overcome.

IV. ANALYSIS OF THE ISSUES

A. GENERAL

As indicated in the previous chapters, the contracting officer is confronted with a plethora of policies, programs and statutory provisions that must be considered during the international acquisition effort.

Not all of these policies, programs and statutory provisions have the same objective and at times may seem to run counter to each other. Statutes as laws of the land normally take precedence where there is conflict between a program and a statutory provision. Viewed another way, it may seem certain programs are incumbered by statutes that prevent their efficient or effective implementation.

DOD's initial efforts to relieve the international acquisition process of the statutory incumberances failed in part due to the wide latitutde sought to waive any or all conflicting statutes. Important to recognize is the fine balance that exists between various U. S. policies, international NATO RSI being only one.

Congress was not going to allow the Department of Defense to determine on a broad scope when international concerns would take precedence over domestic ones. The balance must take into account the preservation of the U.S. competitive procurement process and the assurance of equitable treatment of American industry and labor while trying to resolve disparities between U.S. and Allied military and industrial capabilities and concerns.

It is apparent that for the current period, the contracting officer must work within the existing statutory and regulatory environment.

B. CONTRACTING ENVIRONMENT

In a previous chapter the statutory environment for international acquisition was characterized. Some typical differences were noted between American and European practices which tended to make it difficult to develop agreements and contracts between the U. S. and foreign governments and foreign contractors. The U. S. statutes, and Defense Acquisition Regulation (DAR) provide the general framework within which the contracting officer must work.

The overall objective of this body of regulations is to: (a) prohibit unethical business dealings; (b) provide support for U. S. socio-economic welfare; (c) assure competition and acquisition at the lowest price (all other factors considered); (d) permit the validation of costs; and (e) protect certain domestic industries.

As alluded to previously, the primary difficulties encountered in dealing with foreign parties have been a resentment by foreign nations of mandatory U.S. clauses which impinge on a sovereign's integrity (e.g., officials not to benefit, gratuities, and convenants against contingent fees) and clauses which require examination of records, audits, and submittal of costing data to support proposed foreign prices.

The contracting officer has two alternatives: (1) convince the foreign party to accept the particular provision(s) or (2)

pursue waivers for the statutory and regulatory clauses which have provisions for waiver.

The procedures for waiver of such clauses are by no means perfunctory. Although certain of these provisions such as the Buy American Act now have relatively liberal waiver possibilities, others are not easily ignored or processed.

Review of the statutes which have been identified as applicable to international procurements provide the following breakdown for which statutes are waivable and which are not:

	WAIVABLE
10 U.S.C. 2306(f)	Submittal of cost or pricing data
50 U.S.C. App. 2618	Cost accounting standards
10 U.S.C. 2313 (c)	Examination of records
41 U.S.C. 10a-10d	Buy American Act
	NONWAIVABLE
41 U.S.C. 22	Officials not to benefit
10 U.S.C. 2207	Gratuities
10 U.S.C. 2306(b)	Covenants against contingent fees
10 U.S.C. 2382	Excess Profits Act (Vinson-Trammell)
10 U.S.C. 2304	Maximize advertised competition
P.L. 92-750	Foreign R & D source barred when equally competent U.S. source at lower cost
22 U.S.C. 2354	Restrictions on foreign procurements in order to protect the U. S. economy and industrial mobilization base
Annual Appropriation Act	Restrictions on construction of naval vessels in foreign shipyards.

This list is not all inclusive. Additional clauses have created problems on specific procurement actions.

For example, the provision preventing use of convict labor, 18 U.S.C. 4082(c)(2), and the treatment of bid and proposal and independent research and development costs, P.L. 91-441, both of which are not waivable.

C. WAIVERS

Waiver procedures are outlined in the DAR for those provisions which are waivable. The DAR specifies the criteria under which a waiver can be based and the level of authority required to authorize the waiver. Specific procedures for the waiver of DAR requirements for those waivable statutes mentioned above are discussed below.

In situations where the clause requiring submittal of cost or pricing data is not accepted, the contracting officer may seek a waiver. In the case of a contract with a foreign government or agency thereof, the Head of a Procuring Activity is authorized to make a determination to waive the requirement. The reasons for such a determination are required to be in writing [16:3-807(3)(a)]. In situations where foreign governments are not involved, the Secretary may make such a determination.

For the Navy, the term "Secretary" means the Assistant Secretary of the Navy for Manpower, Reserve Affairs and Logistics (ASN(M,RA&L)). No further definitive guidance is provided for the justification to be included in the determination. Logic, however, dictates that the circumstances be explained.

For example, the rationale for the waiver request, nature of the requirement being procured, the unique circumstances that preclude application of the clause, lack of alternative sources for the requirement, and the method by which the U. S. interest can be protected, even without the cost and pricing certification.

The request for waiver, if a Secretarial signature is required, will receive review prior to release at the Procuring Activity and also at the Chief of Naval Material (CNM) level prior to submission to the ASN (M,RA&L).

Waiver of Cost Accounting Standards is a more involved process. When the contracting officer determines that it is impractical to obtain the requirement from any other source, documentation is prepared which goes forward via the chain of command, Procuring Activity, CNM, ASN (M,RA&L), to the Deputy Under Secretary of Defense, Research and Engineering for Acquisition Policy (USD, R&E(AP)). He in turn makes a request to the Cost Accounting Standards Board (CASB) for the waiver. The CASB may waive any or all of the Cost Accounting Standards.

The request for waiver will describe the requirement and contain: (1) the total amount of the proposed award, (2) a statement that no other source is available to satisfy the requirement, (3) a statement outlining the reasons for rejecting any possible alternatives for fulfilling the requirement, (4) a statement outlining the steps being taken to establish other sources of supply for future procurements of the requirement, and (5) any other pertinent information relative to the waiver request [17:331.30(c)(2)].

In circumstances where the procurement is for the same requirement from the same contractor and a previous waiver has been granted by the CASB, the Secretary is delegated the authority described above.

Waiver of the Examination of Records by Comptroller General clause in contracts with foreign sources requires a determination by the Secretary with the concurrence of the Comptroller General that the inclusion of the clause would not be in the public interest. In cases where the contractor or subcontractor is a foreign government or an agency thereof and is precluded by the laws of the country involved from making its books and documents available for examination, the Secretary may make the determination alone. He must take into account the price and availability of the requirement from U. S. sources and determine that it is in the public interest to exclude the clause. In the case where the Comptroller General is not required to concur, a written report is required to be submitted explaining the determination to the Congress.

It is the policy to include this clause whenever possible and the contracting officer is expected to make all reasonable efforts to do so and consider such factors as alternate sources, additional cost, and time of delivery.

The determination to support the waiver shall: (1) identify the contract or subcontractor and the parties involved, (2) describe the efforts to have the clause included, (3) state the reasons for the refusal to accept the clause, (4) describe alternatives available, and (5) determine it is in the public

interest to exclude the clause [16:49 6-1004].

The basis of a waiver for the Buy American Act can flow from two sources. As mentioned, the "Culver-Nunn" amendment provided the Secretary of Defense authority to waive the Act where it was determined in the best interest of national defense in order to procure standardized or interoperable equipment.

The DAR provides various exemptions. The Act does not apply to requirements for use outside the U.S. The Act does not apply to (1) end products determined unavailable in sufficient quantities and quality in the U.S., or (2) components of end products determined unavailable in sufficient quantities and quality. The determination of nonavailability has various dollar threshholds. For procurements exceeding $1,000,000 the Secretary of the Department or a designee at a level no lower than a Head of a Procuring Activity may make the determination. Such determinations should consider the feasibility of foregoing the requirement or providing a U.S. substitute. Other exemptions apply to Canadian Supplies, Panamanian Supplies for use in the Canal Zone and a determination that domestic source products would be unreasonable in cost or inconsistent with the public interest. There is a procedure to evaluate bids giving preference to U.S. sources on which the unreasonable cost determination is made. [16:6-103]

The waiver procedure is involved and potentially time-consuming. In most situations, numerous levels of review are required to get the ultimate determination for the waiver.

D. MEMORANDUM OF UNDERSTANDING

It has been noted that the memorandum of understanding (MOU) is an agreement between governments or between a government and an international organization and that it sets forth the guiding principles governing the relationship of the parties involved.

The MOU takes a variety of forms and degrees of complexity dependent in most part on the nature of the effort involved. For example, the format for a cooperative development program has been rather well established. [15:47]

A second type of MOU deals with purchases to be made by the U.S. Government from foreign firms either directly or via the foreign government. In addition to the concerns of the cooperative development MOU, a direct government-to-government MOU should reference the applicable laws and establish the basic guidelines and procedures which will govern the direct purchase of a foreign system by the U. S.

The important aspect of either type of MOU is that any laws or regulations which might affect the proposed program should be incorporated into the MOU. In this sense, MOU's generally contain a waiver of the buy national laws of the respective signatories.

For instance, based on an offset agreement contained in a MOU dated 24 September 1975 between the U.S. and the United Kingdom, the Secretary of Defense determined that restrictions of the Buy American Act did not apply to all items of United

Kingdom produced or manufactured defense equipment other than those excluded from consideration by reason of: protecting national security such as maintenance of the mobilization base; legally imposed restrictions on procurement from non-national sources.

Another example is agreement on the performance of audit services found in another U.S./ United Kingdom MOU whereby the British Ministry of Defense (MOD) agreed to provide audit services for DOD activities contracting with British firms, and the Defense Contract Audit Agency (DCAA) agreed to provide audit services for MOD procurement in the United States. Of note, however, is the provision that the agreement does not interfere with the audit prerogatives of the U.S. General Accounting Office, and does not constitute authority to delete the Examination of Records by Comptroller General clause.

This involvement of procurement personnel early in the development of MOU's for programs is important in order to identify potential areas of disagreement relative to the U.S. statutorily imposed requirements of contractural actions.

Normally, a government-to-government MOU references the applicable laws and establishes the basic guidelines and procedures which will govern the direct purchase of a foreign system by the U.S. The actual contractual vehicle is accomplished by a Letter of Offer and Acceptance (LOA). The U.S. initiates the action by furnishing the LOA to the foreign government with the intended buy quantity plus desired terms and conditions. The actual contract results when the completed LOA is returned and accepted by the U.S.

Terms normally associated with U.S. contracts are included in the LOA; prices, recommended delivery schedule, detailed item specifications, data rights, inspection and acceptance procedures and responsibilities, and incorporation of the MOU by reference are examples.

If terms, such as inspection and acceptance, are already covered by a MOU, reference to the applicable MOU normally suffices in the LOA. The ability to reference an existing MOU can facilitate the processing of a LOA extensively. Points agreed to in the MOU are not normally reconsidered as individual LOA's are accomplished under the MOU. Waivers and approvals incorporated in the MOU are not reprocessed and thereby ease some of the administrative burden.

The next chapter will review some specific international acquisitions detailing how various statutory requirements were handled.

E. SUBCONTRACT RELATIONSHIPS

In cooperative development programs, a MOU may contain language that requires the prime contractor to solicit foreign subcontractors. In the case of U.S. prime contractors, various statutory provisions are required to be included in subcontracts let by the prime contractor. Where the contractor is dealing with foreign sources, the same problem can arise, getting the foreign subcontractor to accept the U.S. provisions.

Although the prime contractor bears the brunt of the responsibility for including the provisions in his contracts, the contracting officer is still involved in situations where the contractor

is unable to get the foreign firms to agree to the required provisions.

V. INTERNATIONAL PROGRAMS

A. GENERAL

The Department of Defense's experience with international programs is ever-expanding as current programs mature and new ones come into being.

This researcher looked closely at two Navy programs. The first is a cooperative development, the Rolling Airframe Missile (RAM) program, currently a joint program between the U.S. and the Federal Republic of Germany. The other involves both a direct purchase and cooperative development program, the British-designed Harrier (AV-8A) vertical/short takeoff and landing aircraft and the subsequent cooperative development of air frames and engines for the U.S. improved Harrier (AV-8B) and United Kingdom Sea Harrier programs.

B. ROLLING AIR FRAME MISSILE PROGRAM

The RAM program involves a recently awarded contract for full-scale engineering development of the guided missile weapon system. It is designed to meet the requrements of the U.S., the Federal Republic of Germany (FRG), and Denmark for point defense in a high threat environment.

Other members of NATO have unofficially expressed interest in the concept. They are Belgium, Italy, the Netherlands and Norway. Currently, the program is jointly funded primarily by the U. S. and the FRG with Denmark having a limited funding involvement.

The MOU for the Full-Scale Engineering Development Phase of the RAM system provides that to the extent possible consistent with the nature of the program and the resources available to carry out the program, the Participating Governments will insure that the industry of the FRG is afforded the opportunity to share with the U.S. industry in the work to be performed during the Full-Scale Engineering Development and Production Phases of the program.

In compliance with this provision, the U.S. Navy has encouraged General Dynamics (GD), the prime contractor for the Full-Scale Engineering Phase of the program to solicit sources in the FRG.

The Navy contract has specified language on this subject:

SUBCONTRACTING IN THE FEDERAL REPUBLIC OF GERMANY

> (a) The Contractor shall award subcontracts to industry in the Federal Republic of Germany if it is determined that industry in the Federal Republic of Germany is the most competitive source considering all factors such as the technical and management capabilities of the sources, the schedule implications and the cost to the Program. Notwithstanding any provision of the Subcontracts clause to the contrary, the Contractor shall not enter into subcontracts with industry from the Federal Republic of Germany without the prior written consent of the Contracting Officer.

The contract further provides for incorporation of terms and conditions of the prime contract in any potential foreign subcontracts:

FLOW-DOWN PROVISIONS

> a. The contract contemplates the exercise of the contractor's best efforts to obtain the inclusion in FRG subcontract(s) of provisions of this contract required by the terms of this contract to be so included hereinafter referred to as flow-down provisions. In the event of refusal by a subcontractor to accept these flow-down provisions, the contractor:

(1) shall promptly submit a written report to the Procuring Contracting Officer setting forth the subcontractor's reason for such refusal and other pertinent information which may expedite disposition of the matter; and

(2) shall not proceed with award of subcontract without the written authorization of the Procuring Contracting Officer.

b. Any subcontractor flow-down requirements shall be subject to the right of the Procuring Contracting Officer, at his own instance or upon request of the Contractor, whether to modify or to waive in writing such flow-down requirements whenever he determines that he is not legally compelled to maintain such requirements, and when the respective modifications or waivers, in his judgment, are in the interest of the Government.

As a result of G.D.'s discussion with German industrial sources, the company requested relief from passing on certain provisions to German subcontractors, two in particular: DAR clause 7-104.41, Audit by Department of Defense, and DAR clause 7-104.42(a), Subcontracting Cost or Pricing Data. The German companies contacted by G.D. cited their own regulations (Verordnung uel er Preise bei Oeffentlichen Auftraegan, Regulations on Pricing in Public Contracts, and the Leitsatze fur Preisermittlung aufgrund von Selbstkosten, Rules for the Determination of Cost Pricing) as more appropriate than the cited clauses.

G. D. stated that repeated attempts to persuade German sources to accept the clauses had been unsuccessful even though these sources had complied with the provisions in the past.

The contracting officer concluded, based on G.D.'s efforts, that the German companies would not accept subcontracts with the particular provisions of the DAR clauses, thereby making compliance with the MOU requirement concerning subcontracting in Germany very difficult.

The contracting officer took action to request waivers to exempt all subcontracts performed by German firms in connection with the RAM Program from the requirements of the Audit by DOD and Subcontracting Cost or Pricing Data clauses.

If the waivers were granted, G. D. was to be required to incorporate the applicable provisions of the German regulations into its subcontracts with German industry in order for the German Government to have access to the companies in order to audit the subcontractor's costs.

The waivers were sent forward from the Naval Sea Systems Command via the Chief of Naval Material (CNM) to ASN(M,RA&L). A favorable endorsement was received at CNM but ASN(M,RA&L) did not feel they were fully justified, noting that alternate sources were available. The waivers were denied. G. D. was informed that the burden rested with the firm to work out the differences with the German subcontractors.

In the subsequent discussions with the German firms, G.D. was provided with information that the CASB and Germany, specifically representatives of the Defense Ministry and the Industrial Association BDI, has reached an agreement to the effect that German contractors or subcontractors would be exempted from the Cost Accounting Standards (CAS) requirements in the event of military orders placed by the U.S. or its contractors. The agreement provided that Cost Accounting Standards would be substituted by German Pricing Regulations VPOR with audits to be carried out by the German Federal Office of Military Technology and Procurement (BWB).

G. D. and the representatives of the German subcontractors with the aid of the German Ministry of Defense developed language that reflected aspects of the discussions held by the CASB and German representatives. Clauses were developed covering both accounting principles and audit procedures. Ultimate acceptability of the clauses required additional involvement by the Under Secretary of Defense for Research and Engineering and his counterpart in the German Ministry of Defence.

In essence, the outcome was a compromise between the U. S. regulations and German regulations. The clause developed for inclusion in G.D.'s contracts with its German subcontractors reads as follows:

> Special Provisions Regarding Accounting Principles and Auditing Procedures of FRG Subcontracts
>
> It is the understanding between the parties that the governments of the Federal Republic of Germany and the United States are planning to arrange for updating existing agreements between the governments regarding the application of national pricing rules and regulations and audit practices used in acquisitions involving the two governments. Until such time as an updated agreement is reached and implemented by the two governments the following shall apply to this subcontract only:
>
> a. Accounting Principles
>
> The Seller shall utilize the cost principles set forth in the VO PR 30/53 including the Leitsatze fur Preisermittlung aufgrund von Selbstkosten (LSP) (appendix to the VO PR 30/53).
>
> It is agreed, that the following costs unallowable under DAR Section XV are disallowable under VO PR 30/53 too:
>
> -bad debts
> -idle facilities
> -losses on other contracts
> -cost of organization and reorganization
> -uneconomical leasing and rental cost
> -product-related advertising expenses
> -expenses for recreation, entertainment, and the like

-interest and other financial costs
-plant reconversion as agreed by Purchase Order
-uneconomical relocation.

The following costs allowable under the provisions of VO PR 30/53 but unallowable under DAR Section XV will be subject of negotiations between the parties to the subcontracts in order to comply with DAR Section XV unallowables:

-advertising costs (to the extent unallowable by U. S. Statutes)
-contributions and donations
-bid and proposal (to the extent unallowable by U. S. statutes)
-depreciation on the basis of replacement costs
-independent research and development, if applicable (to the extent unallowable by U. S. statutes).

If the contractor customarily uses the replacement cost to determine depreciation costs, the contract cost will be computed as if depreciation had been based on the actual acquisition cost. The invested capital on which the calculation of the imputed interest is based will be adjusted in the same manner. These adjustments may be effected in the form of lump sum adjustments.

It is understood and agreed that application of the German pricing regulations to U.S. contracts does not prejudice questions concerning the rate of profit or fee to be earned under this subcontract. It is recognized that the rate of profit or fee or amount of profit or fee will remain subject to the negotiations by the contract parties concerned and that deviations from the German pricing regulations (items of cost which are deemed unallowable under DAR) will be taken into account in negotiating the rates of profit or fee for this subcontract.

b. Designation of Audit Agency

With the exception of Clause B-7, Examination of Records by Comptroller General, the Federal Office of Military Technology and Procurement (BWB) in the Federal Republic of Germany has been authorized as the representative of the U. S. Government and Buyer as set forth in B-5, Audit by Department of Defense, and any provisions of this subcontract expressly or by reasonable implication contemplating access to records of the seller, for conducting proposal price and cost reviews, actual cost audits and audits to determine allowability of costs in accordance with the principles set forth in Special Provision entitled "Accounting Principles" above, of Seller's contract or Seller's subcontractors at any tier within the Federal Republic of Germany under the RAM Contract N00024-79-C-4202.

In the event the Prime Contract is modified to reflect agreements reached between the two governments, then the parties shall agree to enter into negotiation in good faith to modify this purchase order.

The purpose of this example is to show that even with a MOU designed to provide an umbrella under which the contractor was to be able to gain access to German firms, not all facets of the contracting process were covered. Problems that had not appeared before did, based on a new position taken by the German firms.

Not all areas of disagreement were solved. Certain costs allowed under the German regulations and not allowed by DAR Section XV are subject to negotiation with G. D. bearing the responsibility to ensure its subcontracts with the German firms are "most competitive considering all factors." G. D. is not relieved of any of the DAR provisions.

The solution reached is for the instant contract only with reference made to the fact that ultimate agreement as to how these terms would be agreed upon would rest with a forthcoming agreement between the governments reflected in the MOU.

The impact on the contracting officer can be seen in different ways. The waiver process is not uncommon in totally domestic contracts. Getting top level officials of the DOD involved in procurement problems is also not uncommon. The unique aspects of this type of situation are the new procedures developed and the new procedents established in areas that previously did not exist.

There are established procedures for handling the types of waivers that are being requested. The effort required to

process such waivers cannot be discounted. Extensive preparation and documentation is required for each level of review. It can be a time consuming process.

The contracting officer is required to work with a number of parties, the contractor, the subcontractors and the German Government, to accomplish his responsibilities. Efforts were expended to analyze the German regulations to determine their specific coverage and requirements relative to the DAR requirements under contention.

The international aspect of the situation has an effect on the contracting officer dealing with foreign contractors. A recent study identified many cultural differences that can detract, impede and influence the negotiation process. The study noted that the functions could best be accomplished by individuals "who understand the language, customs and business philosophy of each country" with whom business is conducted. [18:46] The Government contracting officer is generally not experienced in dealing with these new international cultural differences.

The actual burden on the contracting officer is hard to determine. No doubt it requires more ability to work effectively with the added dimension to the procurement process. The potential for waivers requires a flexibility already existing under current procedures. The resultant workload to process such waivers can be difficult to include in the procurement planning process but such contingencies should be anticipated.

C. HARRIER PROGRAM

The AV-8A Harrier was designed and developed by the British and has been in the U. S. Marine Corps inventory since 1971. The issue of an improved version of the AV-8B has been studied closely and debated. The AV-8B is an improved vectored thrust V/STOL aircraft with twice the range and payload capability of the current AV-8A.

In late 1975 the United Kingdom (UK) and the U. S. signed a new agreement to ensure continued information exchange and close coordination on the U. S. version of the AV-8B and the U.K. version. The two countries will ultimately determine the degree of commonality between their aircraft when they enter into full-scale development.

In April of 1979 a MOU between the U.K. and the U. S. was signed relating to the AV-8B Full-Scale Development. Both countries are still discussing to what extent the program will actually go ahead, production decisions having not yet been made.

Under the MOU with the U.K., Letters of Offer and Acceptance (LOA) are utilized to accomplish specific procurement actions and are considered contracts between the U.S. and the U.K. The LOA's have required waivers and deviations to existing DAR provisions. Further, they have required the U.K. to agree to accept certain DAR provisions which could not be waived.

The principal issue put forth in the negotiations by the U.K. has been the question of when one government contracts

with its own industry on behalf of another government whose procurement practices and policies will be followed. The U.S., when it contracts on behalf of another government, follows established U.S. procurement policies and procedures and does not deviate from them to accommodate the foreign government.

The U.K.'s argument against following U.S. procedures has fallen into two categories. The first is that as a sovereign government providing service for another government, they ought not to be required to follow the laws and regulations of that other government in providing the service of contracting. The second is that it is inefficient to follow one set of policies and procedures when contracting with its industry on its own behalf and to follow another set of policies and procedures when contracting on behalf of another government. There is some merit to these arguments.

The U. S. has countered basically with the statement that if the U.K. doesn't agree to the provisions, U. S. appropriated dollars would not be spent in the U.K.

As in most negotiations, a compromise is reached. Although not normally part of their procurement policies and procedures, the U. K. has reluctantly agreed to follow certain DAR provisions. These DAR provisions are based on statutes without waiver possibility or which are extremely sensitive from a public opinion point of view so that the U.S. chooses not to waive them. For example, DAR 17-205.11, Entertainment.

The provisions accepted by the U.K. are as follows:

10 U.S.C. 2306(b) DAR 7-103.20	Contingent Fees

41 U.S.C. 22 DAR 7-103.19	Officials not be Benefitted
10 U.S.C. 2207 DAR 7-104.16	Gratutities
P.L. 91-441 DAR 15-205.35, 15-205.3	R&D and Bid and Proposal Costs
DAR 15-205.8	Donations
DAR 15-205.11	Entertainment
DAR 15-205.1	Product Advertising
DAR 7-103.15	Rhodesia and Certain Communist Areas

The U. S. on their part agreed to waive certain DAR provisions in order to accommodate the U.K. in their desire that they follow their own procurement policies and procedures to the maximum extent practicable.

The following DAR provisions were waited by the U.S.:

10 U.S.C. 2313(c) DAR 7-104.15	Examination of Records by the Comptroller General
10 U.S.C. 2313 DAR 3-807.3, 3-807.4	Cost or Pricing Data and Certificate of Current Cost or Pricing

Waiver and deviation from the above requirements are sought on an individual LOA basis. The Examination of Records clause waiver has been based on the fact that both the Pegasus engine and AV-8A Harrier airframe were designed, developed and produced by U.K. firms to Royal Airforce specifications. No alternatives are currently available and as such the MOD is the only entity presently capable of providing the manufacturing and support necessary for the procurement of the airframe and engine. The MOD has steadfastly and consistently refused to accept the

clause providing access by another sovereign government to records of British firms. It was determined based on the foregoing that it would be in the public interest to waive the clause. The ASN (M,RA&L) signed the waiver.

It should be noted that the MOU has language in it relative to British cost procedures. This is an outgrowth of discussions held between the CASB and MOD. It was determined that the U.K.'s normal procedures for the purpose of negotiating prices or verifying claims was sufficient to establish cost projections for future requirements. Further, that the MOD would endeavor to provide access by the U.S. when requested to contractor's cost and pricing data necessary to substantiate specific proposals and to validate claims of cost incurred.

The rationale for waiving the requirement for cost and pricing data is much the same as that for Examination of Records. Specific mention is made that the U.K. will use its normal contracting procedures. These procedures do not involve submission and certification of cost and pricing data to the degree required under the U. S. procedures. The U.K. procedures do preclude excessive contractor profits and, as such, will be followed. Again the language in the MOU is germane.

Thus, although both these clauses were waived, the U.S. does have certain assurances and rights as provided for in the MOU. Combined with the statutory provisions the U.K. has agreed to, U. S. interests are protected.

The Harrier program has considerable history as far as international programs are concerned and for this reason most of the unique problems have been already met. Precedents have

been established, the routine for processing waivers established. The requirement for adequate planning has been rather well defined based on previous experience.

Time was spent establishing which provisions would be accepted by the U.K. For example, a waiver was requested for DAR 15-205.11, Entertainment. The request proceeded all the way to what was then called the Armed Services Procurement Regulation (ASPR) Committee. Upon consideration, the Under Secretary of Defense, Research and Engineering for Acquisition Policy, had the request withdrawn. He did not want the precedent established and, further, was concerned about the potential for adverse public opinion.

The contracting officer informed his counterpart in the MOD that he had exhausted his available remedies to have the clause waived. The MOD verified this with the USD, R&E(AP) and subsequently accepted the clause. The issue has not come up again.

It is not intended to convey that the procurement process in this international program is totally without burden. The additional effort is real. Contracting officers do change and there is sometimes limited corporate memory. Dealing with cultural differences must be learned and mostly by first hand experience.

The Harrier Program has been unique, sharing with one or two other Navy programs a history of experience on which better preparation for specific contracts can be based.

VI. CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS

1. There are alternatives to the contractual statutory provisions. It is recognized that foreign parties are often reluctant to accept many U.S. imposed provisions in their contracts. Although certain statutory requirements have no waiver potential by DOD, with Congressional action being the only alternative, there are are statutory provisions that do have waiver possibilities. The criteria for a determination varies. It is not an automatic process of requesting and subsequently granting the waiver request. Some waivers can be granted at a relatively low command level, others involve numerous command approvals prior to the ultimate determination. It can be a lengthy and tedious process.

The justification and criteria for waivers is not always that clear. The contracting officer, depending on his previous experience, is required to learn by doing. Criticism that results in resubmittal of a waiver request to the various approval levels is not only an administrative burden to all involved, but also is time consuming and can raise havoc with procurement planning.

This learning by doing is one of the key factors in current international acquisition programs. Contracting officers are, as a program matures, developing a rapport with the foreign parties with which they are dealing on a particular program. Almost on

a trial and error basis each party learns the ground rules and the limitations of the other party involved.

Even in the situations where the provisions are non-waivable, frequently language can be developed agreeable to both parties that in essence spells out a procedure that accomplishes the intent of the provision without requiring the specific action required by the original provision.

2. Memoranda of Understanding are important agreements. They are designed to set forth the guiding principles governing the relationship of the parties to the agreement. Their effectiveness in the contracting process can partly be measured by the extent to which the agreement covers the participants' specific laws and regulations that affect acquisitions accomplished under the MOU.

3. Contracting procedures differ from country to country. Difficulties arise in assessing how to get the same level of confidence with various sets of contracting procedures. The recent agreements reached by the CASB and other governments relative to the particular country's contracting methods have been helpful. These agreements have not covered the entire contracting spectrum, being limited to areas within the purview of the CASB.

4. Differences of interpretation may occur as different United States agencies deal with a particular foreign country or firm. Without some type of central coordination, the opportunity exists to get inconsistent positions relative to waiving of particular statutes. Although the facts of a particular action must support each individual waiver, the importance

of maintaining a consistent approach with respect to each foreign party cannot be stressed enough.

B. RECOMMENDATIONS

1. One primary source of information should be available so that both U.S. contracting personnel and foreign parties would have a reference or framework of statutory provisions that may affect an international acquisition. The unwaivable statutory provisions would be listed. Potentially waivable provisions would also be listed. The criteria for waivers should be provided so that the requesting parties understand the type of justification required to support a waiver request. Justifications should provide alternative procedures to gain, to the extent possible, the same level of confidence as envisioned by the original statutory provision. U. S. contracting officers should insure that alternate sources for the requirement have been explored, sources that would accept the statutory provision.

I would suggest that this information be included in a change to DAR Section VI or as an appendix to the Section, in the same manner that Appendix O currently is structured for Cost Accounting Standards. The responsibility for this change should rest with the Office on International Acquisition which was recently established on the staff of the Under Secretary of Defense, Research and Engineering for Acquisition Policy.

2. Waivers should be included in the MOU's developed between the governments. The waivers and supporting justifications would be approved on a one-time basis within the scope of the MOU.

Subsequent contracts placed under the MOU would not require individual waivers, for example, as is the case with the AV-8B Full-Scale Development MOU. This recommendation would require early involvement of the contracting officer on the MOU negotiation team. The justification issues would be addressed at this point in time. Coordination to insure more consistency would be provided by the Office on International Acquisition. They would be charged with implementation of such a requirement by changes to current directives, DODD 5530.3, International Agreements, or by issuance of a policy memorandum.

Both of these recommendations would reduce the impact on the contracting officer of the difficult and time consuming waiver process. It would not relieve the requirement for waivers in all circumstances, but would reduce some of the administrative workload. Foreign parties would be put in a better position to understand the U. S. requirements for entering into a contract with more of a potential for concentrating on the central issues of the instant contract and not the general terms and conditions.

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